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OFFICE OF PETITIONS

In re Application of :
Yung, et al. :
Application No. 09/429,624 : ON PETITION
Filed: October 29, 1999 :
Attorney Docket No. 10624.0015 :

This is a decision on the petition to revive under 37 CFR 1.137(a), filed February 18, 2004.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)". Extensions of time under 37 CFR 1.136(a) are permitted.

The above-identified application became abandoned for failure to timely file a reply to the final Office action mailed October 17, 2002. This Office action set a shortened statutory period for reply of three months. No extensions of time under 37 CFR 1.136(a) were obtained. No reply having been received, the above-identified application became abandoned on January 18, 2003. A Notice of Abandonment was mailed on May 21, 2003.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set

forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.¹

Moreover, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable."²

On petition, petitioner states that the previous assignee, Certco, Inc., was subject to a Chapter 11 bankruptcy proceeding during the entire period for responding to the October 11, 2002 Office action. In support thereof, petitioner has included a copy of an "Order Scheduling Initial Case Conference", dated August 14, 2002. In addition, petitioner has included a copy of an "Order, Pursuant to Inter Alia, 11 U.S.C. §§105, 363 and 365 Approving the Sale of Certain Assets and Related Relief", dated May 7, 2003.

Afterwards, the secured creditors conveyed their interest in CertCo Inc. to CQRCert LLC on July 30, 2003. Shortly thereafter, CQRCert LLC secured counsel and began the process of evaluating its intellectual property assets. This process was concluded on February 17, 2004. One day later, the instant petition was filed.

Petitioner makes his case for unavoidable delay by stating that "CertCo, Inc. was subject to the restrictions of the Chapter 11 Proceeding at all times during the period for responding to the October 17 Office Action, and therefore unable to respond to the October 17 Office Action." However, petitioner has not provided any details of the restrictions of the Chapter 11 proceeding.

Receipt of the Notice of Appeal, filed with the instant petition, is acknowledged. The amount of \$330 for the Notice of Appeal fee

¹ In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

has been charged to petitioner's deposit account, as authorized. However, the two-month period for filing an appeal brief in triplicate (accompanied by the fee required by 37 CFR 1.17(c)) will not run until such time as petitioner files a grantable petition to revive and a decision on petition is mailed.

While the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable, petitioner is not precluded from obtaining relief by filing a petition pursuant to 37 CFR 1.137(b) on the basis of unintentional delay. A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by (1) The reply required to the outstanding Office action or notice, unless previously filed; (2) The petition fee as set forth in 37 CFR 1.17(m), currently \$665 for a small entity; and (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 P.O. Box 1450
 Alexandria VA 22313-1450

By FAX: (703) 872-9306
 Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (703) 305-0272.



Cliff Congo
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Office of Petitions